U.S. Senate
Republican Policy
Committee

Legislative Notice

Jon Kyl, Chairman

July 7, 2004

No. 42B (Updated) (first issued October 20, 2003)

S. 2062 — The Class Action Fairness Act

Calendar No. 430

The Class Action Fairness Act of 2004 was read the second time on February 11, 2004, and placed on the Senate Legislative Calendar under General Orders.

Noteworthy

- On Tuesday, July 6, the Senate proceeded to the consideration of S. 2062, the Class Action Fairness Act. There is *no time agreement* for the consideration of this measure.
- A non-exclusive, subject-to-change list of non-germane amendments includes bills related to Immigration, Drug Reimportation, Energy, Global Climate Change, Assault Weapons Ban, and Mental Health Parity. In addition, possible related amendments are listed on page 7.
- An earlier version of the Class Action Fairness Act was reported favorably with an amendment by the Judiciary Committee on June 2, 2003, by a bipartisan vote of 12-7. (Voting Nay: Senators Leahy, Kennedy, Biden, Durbin, Feingold, Schumer, and Edwards.) See S. 274 and S. Rept. 108-123; minority views filed.
- On October 22, 2003, the Senate failed to reach cloture on a motion to proceed to S. 1751, an earlier version of S. 2062, by a vote of 59-39. (See Record Vote Analysis No. 403.) All Republicans except Senator Shelby voted in favor of cloture and were joined by Senators Bayh, Carper, Feinstein, Jeffords, Kohl, Lieberman, Lincoln, Miller, and Ben Nelson.
- In December 2003, the bill's sponsors negotiated changes that, according to their statements in contemporaneous press reports, satisfy Senators Dodd, Landrieu, and Schumer. All those changes are embodied in this legislation — S. 2062. With the addition of these three Senators, who are now cosponsors of the bill, there are now 62 Senators who either voted for cloture on S. 1751 and/or have stated publicly that they support this version, S. 2062.
- ***This Legislative Notice summarizes the changes in S. 2062, as compared to S. 1751. All offices are also receiving a copy of the original Legislative Notice No. 42, dated October 20, 2003, which contains a section-by-section analysis of S. 1751.***

Summary of S. 2062 versus S. 1751

S. 2062 represents a compromise version of S. 1751 as reported by the Judiciary Committee. The RPC's Legislative Notice (No. 42) for S. 1751 contains a section-by-section description of that bill. Below is a section-by-section description of how S. 2062 *differs* from S. 1751.

(As a point of clarification, note that S. 1751 was itself a modified version of S. 274, the original Class Action Fairness Act reported from Committee, and was the bill that Senators attempted to proceed to consider on the floor last October.)

- ***Changes to Section 3***
    - **Coupon Settlements.** Adds a provision limiting applicability of section 3 to coupon settlements (as opposed to other non-cash settlements). As to coupon settlements, attorneys fees must be based either on (a) the value of coupons actually redeemed by class members or (b) the hours actually billed in prosecuting the class action (with no prohibition on lodestar multipliers). Also adds a provision permitting a federal court to require, at its discretion, that the settlement provide for distribution of a portion of the value of unclaimed coupons to a charitable organization or government entity; however, such a distribution may not be used as a basis for an attorneys fee award.
    - **Bounties.** Deletes proposed section 1715, which would have restricted payments of bounties to class representatives.
    - **Clear Statement Requirement.** Deletes proposed section 1716. The U.S. Supreme Court has approved changes to the Federal Rules of Civil Procedure that require better notice to class members. This deletion also brings the bill into conformity with the House-passed bill (H.R. 1115).
- ***Changes to Section 4***
    - **Feinstein Compromise.** Modifies the multiple "Feinstein Compromise" factors to be considered by a federal district court in deciding whether to exercise jurisdiction over class actions in which between one-third and two-thirds of the proposed class members and all primary defendants are citizens of the same state. *First*, it adds a factor to consider whether there is a "distinct" nexus between (a) the forum where the action was brought and (b) the class members, the alleged harm, or the defendants. *Second*, it requires the court to consider whether one or more class actions asserting the same or similar claims on behalf of the same or other persons have been filed over the last three years.
    - **Local Class Action Exception.** Adds a new provision that allows cases to remain in state court if: (1) more than two-thirds of class members are citizens of forum state; (2) there is at least one in-state defendant from whom significant relief is sought by members of the class and whose conduct forms a significant basis of plaintiffs' claims; (3) the principal injuries resulting from the alleged conduct, or related

conduct, of each defendant were incurred in the state where the action was originally filed; and (4) no other class action asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons has been filed during the preceding three years.

- **Class Composition Rules.** Clarifies that citizenship of proposed class members is to be determined on the date that plaintiffs filed the original complaint, or if there is no federal jurisdiction over the first complaint, when plaintiffs serve an amended complaint or other paper indicating the existence of federal jurisdiction.
- **Dismissal of Cases that Fail to Meet Rule 23 Requirements.** Deletes provision under which federal courts would have dismissed class actions if the court determined that the case did not meet Rule 23 requirements, with the potential that the case would be re-filed in state court and subsequently removed again to federal court. This change allows existing law to apply, so that a removed case in which class certification is denied would simply remain in federal court as an individual action.
- **Mass Actions.** Changes jurisdictional amount requirement, such that federal jurisdiction shall exist over those persons whose claims satisfy the normal diversity jurisdictional amount requirement for individual actions (presently $75,000). Changes "single sudden accident" exception to exclude from jurisdiction mass actions in which all claims arise from an event or occurrence that took place in the state where the action was filed and that allegedly resulted in injuries in that state or in states contiguous thereto. Adds a provision clarifying that there is no federal jurisdiction under the mass action provision for claims that have been consolidated solely for pretrial purposes.

- ***Changes to Section 5***
  - **Removal Provision.** Deletes a provision allowing *plaintiffs* to remove class actions.
  - **Appellate Review of Remand Orders.** Provides discretionary appellate review of remand orders with time limits. Parties must file notice of appeal within seven days of remand order. Appeals court must issue final decision on appeal within 60 days unless parties agree otherwise or court avails itself of one 10-day extension.
- ***New Section 7 – Enactment of Judicial Conference Recommendations.*** Adds a provision expediting enactment of pending amendments to Rule 23 of the Federal Rules of Civil Procedure.
- ***New Section 8 – Rulemaking Authority of Supreme Court and Judicial Conference.*** Clarifies that nothing in the bill restricts the authority of the Judicial Conference and Supreme Court to implement new rules relating to class actions.

Background

The following background was provided in Legislative Notice No. 42 (issued October 20, 2003). The same policy rationale applies to S. 2062.

Class action lawsuits allow plaintiffs whose injuries might not be worth enough to justify bringing individual suits to combine their claims into one lawsuit against a common defendant. In recent years, however, a relatively small number of class action plaintiffs' attorneys have abused the class action procedures. The effects have been dramatic: a distortion of our federalist system by the actions of a few rogue state courts; excessive attorney fee awards at the expense of injured plaintiffs; unprecedented costs to the national economy; and an overall decline in public respect for our nation's judicial system.

The Loophole in Federal Court Jurisdiction Rules for Multi-State Class Actions. The U.S. Constitution provides for federal jurisdiction over all lawsuits between citizens of different states, i.e., those cases where the parties are of "diverse" citizenship. Today, the most obviously "national" types of litigation — multi-million-dollar class action lawsuits involving national companies engaging in interstate commerce with citizens of many states — are often stuck in state court. This is so because *Congress* has narrowly construed constitutional diversity to require "complete diversity" — requiring *all* plaintiffs to be diverse from *all* defendants. Consequently, national class actions with plaintiffs from all 50 states and defendants from multiple states are rarely eligible for federal court. The current rules allow lawyers to game the system and direct their claims to certain state courts. The result of this "forum shopping" is that a few state courts effectively regulate national industries and professions beyond state borders.

The Constitution provides for federal jurisdiction over cases between citizens of different states precisely so that parties never have to deal with questions of local bias. The Senate need not pass judgment on the quality of state court judges — most of whom are undoubtedly of high integrity and competence — to recognize that national, multi-state class actions should not be barred from the federal courts. However, Congress must change the diversity rules to ensure national class actions are heard in their proper forum — federal court.

The Growing Abuse of Coercive Interstate Class Actions. A lawyer-driven class action industry devoted to finding opportunities to extract financial payments from American business has developed in the past few decades. A focused group of attorneys "shop" throughout the nation for the friendliest courts to hear possible cases. They drag interstate businesses into carefully-chosen state courts where judges hastily certify classes without regard to Due Process concerns and where juries are known to render extravagant awards. Many of these lawsuits implicate citizens of many states and involve interstate commerce — precisely the kinds of lawsuits better suited to the federal courts. One study estimates that virtually every sector of the United States economy — including long-distance carriers, gasoline purchasers, insurance companies, computer manufacturers, and pharmaceutical developers — is on trial in *only three counties* (Madison County, Ill.; Palm Beach County, Fla.; and Jefferson County, Tex.).

Current Class Action Abuses Continue to Harm Plaintiffs. Injured plaintiffs are suffering due to weak state court oversight of class action lawsuits. As a result of lax supervision, the legal system returns less than 50 cents on the dollar to the people it is designed to help, and only 22 cents to compensate for actual economic loss.[1]

[1] Tillinghast-Towers Perrin, U.S. Court Costs: 2002 Update, Trends and Findings on the Costs of the U.S. Tort System, at 1, available at http://www.tillinghast.com/tillinghast/publications/reports/2002_Tort_Costs_Update/

Many settlements consist of extravagant payments to plaintiffs' attorneys and nothing of real value to the injured plaintiffs. For example, in a case against Blockbuster, Inc., customers who alleged they were charged excessive late fees for video rentals were to receive $1 coupons while their attorneys received over $9 million.[2] In an Illinois case about cellular phone charges, settling class members received coupons to buy future products, while their attorneys received more that $1 million in fees.[3] In a similar "coupon" case settlement in California, class members received a $13 rebate towards the purchase of new computer monitors, while their attorneys received $6 million.[4] These coupon settlements represent a boon to plaintiffs attorneys (who receive the bulk of the benefit) and defendant companies (because coupons are rarely redeemed).

Injured plaintiffs also suffer when they receive complicated settlement notices that fail to explain clearly their right to challenge the settlement or to enjoy its full benefits. Also troubling are settlements crafted to provide very large payments to the original "named" plaintiff in order to persuade that plaintiff to agree to a settlement that will give fellow class members far less, if any, compensation.

The Costs of Runaway Litigation to the National Economy. Over the past decade, class action lawsuits have grown by over 1,000 percent nationwide.[5] These increased claims inevitably produce hasty, unjust settlements. This is because class actions aggregate many potential claims into one lawsuit, and in many cases an unfair or unconstitutional class certification ruling cannot be appealed until after an expensive trial on the merits. Defendants face the risk of a single judgment in the tens of millions or even billions of dollars, simply because a state court judge has rushed to certify a class without proper review. The risk of a single, bankrupting award often forces defendants to settle the case with sizable payments even when the defendant has meritorious defenses. As one federal court explained, "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail."[6]

This "judicial blackmail" imposes increased costs on the economy, causing higher prices and lower wages and the enrichment of those attorneys who brought the weak claims in the first place. When litigation costs become too unpredictable, the effect will be to dissuade investment, discourage entrepreneurship, increase the costs of risk planning, and threaten the core activities essential to our economy.

Tort_Costs_2002_Update_rev.pdf. Tillinghast is an international actuarial and management consulting company that has been examining the U.S. legal system's costs in published studies since 1985.

[2] "Blockbuster customers to be reimbursed for late fees," Associated Press, 11 Jan. 2002, discussing Scott v. Blockbuster, Inc., No. D162-535 (Jefferson County, Texas, 2001).

[3] Michelle Singletary, "This 'Settlement' Doesn't Ring True," Washington Post 5 Sept. 1999, at H-01.

[4] Michelle Singletary, "'Coupon Settlements' Fall Short," Washington Post 12 Sept. 1999, at H-01.

[5] Class Action Watch, Vol I, No. 2 (Spring 1999), available at http://www.fed-soc.org/Publications/classactionwatch/classaction1-2.pdf (finding increase of 1,315 percent over previous decade); Tillinghast-Towers Perrin at 1.

[6] Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996); see also Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense"); In the Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995) (noting the "intense pressure to settle" rather than "roll[ing] the[] dice" by taking the case to a jury).

Administration Position

The Administration has yet to release a Statement of Administration Policy on S. 2062. However, the Administration did release a strong statement of support for S. 1751 on October 21, 2003. See http://www.whitehouse.gov/omb/legislative/sap/108-1/s1751sap-s.pdf.

Other Views

Senators Leahy, Kennedy, Biden, Feingold, Schumer, Durbin, and Edwards filed minority views in relation to S. 274 when it passed through the Judiciary Committee. Those views, available at pp. 73-89 of the Committee Report, S. Rept. No. 108-123, are summarized below. ***These minority views do not take into account the negotiations that resulted in S. 2062.***

- The minority senators argued that the class action bill sends most state class actions into Federal court and deprives state courts of the power to adjudicate cases involving their own laws. They argue that the bill therefore infringes upon States' sovereignty.

  The Committee has responded that there is no evidence for this assertion, and that it is the present system that infringes upon state sovereignty rights by promoting a "false federalism" whereby some state courts are able to impose their decisions on citizens of other States regardless of their own laws. (See also Committee Report response at pp. 51-54; 59-60.) ***[S. 2062's local class action exception keeps more class actions in state court.]***

- S. 274 unduly expands federal diversity jurisdiction at a time when courts are overcrowded; concerns about local court prejudice are overblown.

  The Committee has responded that state courts have experienced a much more dramatic increase in class action filings and have not proven to be any more efficient in processing complex cases. The Committee further responds that federal courts have greater resources to handle most complex, interstate class action litigation, and are insulated from the local prejudice problems so prevalent under current rules.

- The consumer bill of rights provisions are favorable, but do not do enough to battle abuses in the class action system.

  The Committee has responded that the consumer bill of rights discussed above and at length in the Committee Report will benefit consumers greatly.

- The bill should contain special carve-outs for civil rights cases, state consumer protection cases, state environmental protection cases, gun liability cases, and tobacco cases.

  The Committee has responded that proponents of such carve-outs have never established that state courts would provide more fair or expeditious treatment for these claims. (Committee Report response at pp. 55-57.)

- S. 274 will cause federal cases that do not satisfy the requirements of the Federal Rules of Civil Procedure to be dismissed. If re-filed in state courts, they will just be removed and dismissed again. This "merry-go-round" deprives injured parties of access to the courts.

  The Committee has responded that it makes no sense to allow a class action to proceed in state court after a federal court has determined that the class cannot be certified, because doing so would turn federalism upside-down. Litigants can always re-file in state court on an individual basis. (Committee Report response at pp. 64-65.) ***[S. 2062 now permits the case to remain in federal court, but as an individual (non-class) claim.]***

Possible Amendments

Non-Germane Amendments

As has been reported in the press, a number of non-germane amendments *might* be offered to S. 2062. A non-exclusive, subject-to-change list includes bills related to Immigration, Drug Reimportation, Energy, Global Climate Change, Assault Weapons Ban, and Mental Health Parity. Additional information is unavailable at this time.

Related Amendments

Based on votes in the Judiciary Committee and on views expressed in the Committee Report, Senators should be prepared for several amendments that are related to the substance of the bill.

Carve-out amendments. Several Judiciary Committee Democrats offered amendments in committee to create special carve-outs for certain types of cases, such as environmental, gun, civil rights, tobacco, and consumer protection. All amendments were defeated on a bipartisan basis. The Committee urges opposition to any carve-out amendments because federal courts have more resources and are better equipped to handle complex, interstate class action cases. While it is true that federal courts typically apply the rules of civil procedure more carefully and meticulously than some state courts, there is no evidence that federal courts are any less fair or capable. The Committee points out that federal courts are often the forum of choice for civil rights and tobacco litigants.

"Merry-Go-Round" amendment. Senator Feingold offered an amendment in Committee to permit cases that fail to meet federal class action certification requirements to proceed in state court if state court class certification rules could be met. The amendment would address the "Merry-Go-Round" charge leveled by some critics of the bill. The amendment was defeated in Committee on a bipartisan basis. The Committee urges opposition to this amendment because the amendment would gut the bill essentially by preserving the status quo. This bill moves substantial interstate litigation into federal courts where it belongs. It is unknown whether the changes in S. 2062 are sufficient to dissuade opponents from offering amendments on this point.

Amendments to Undo Feinstein Compromise. As discussed in Legislative Notice 42, the Committee reported S. 1751 with a compromise negotiated with Senator Feinstein. Democrats may offer a variety of amendments to weaken the compromise agreed to in Committee. For

example, they may offer amendments to keep more cases in state courts and to remove the "primary defendant" requirement so that more cases are subject to the criteria embodied in the Feinstein amendment adopted in Committee (in Section 4 of the bill). In particular, the press has reported that Senator Bingaman may offer one or more amendments to this effect. The Committee urges defeat of these amendments because the compromise worked out with Senator Feinstein was a carefully crafted agreement that draws appropriate lines to ensure that large, interstate class actions can be removed to federal court.

Leahy/Breaux Substitute amendment. Senator Leahy or Breaux (or another Democrat) may offer a substitute amendment to the bill. The substitute would keep cases in state court if defendants do "substantial business" in the State. The Committee urges defeat of this amendment because it would preserve the status quo and fail to solve any of the problems that form the rationale for this bill. The substitute, the Committee states, would turn diversity jurisdiction on its head by allowing States to adjudicate traditionally federal cases between citizens of two different States.